JOHORE REPORTS.

[APPELLATE CRIMINAL JURISDICTION]

COURT OF APPEAL.

McELWAINE, C.J., (S.S.), POYSER, C.J., (F.M.S.) & GORDON-SMITH, Ag. J.A.

August 1, 1939.

THURAIRAJAH - - Appellant

vs.

THE PUBLIC PROSECUTOR - Respondent.

[CRIMINAL APPEAL No. 8 of 1939]

Criminal Law—Acceptance by a Public Servant of a valuable thing without consideration—Section 165 of Penal Code—Criminal intention—Section 107 of Evidence Ordinance—Onus of Proof.

The appellant had accepted a sum of $30/- in cash from one Cheah Koon Hwee, whom he knew to be concerned in a proceeding which had connection with his official position as Senior Health Inspector, Segamat. In his defence to a charge under Section 165 of the Penal Code he stated in evidence that he had taken the money as a Chinese New Year Gift, intending to return it the following day. The Magistrate ruled that the onus of proving such intention was cast upon the appellant by Section 107 of the Evidence Ordinance. He accepted the evidence of the appellant in regard to other disputed facts, but held that, as the appellant had failed to adduce any evidence—though within his power to do so—to corroborate the evidence he had given himself, he had failed to discharge the onus which lay upon him.

Held, by the Court of Appeal, that where an accused person has by his own evidence succeeded in raising a doubt, he must be deemed to have tilted the scale of probability in his own favour and should be acquitted.

Cases referred to:—

(1) *Chia Chan Bah v. The King,* 7 M.L.J. 147.

(2) *Emperor v. Dampala,* (1937) A.I.R. (Rangoon) p. 83.

(3) *Lim Tong v. Public Prosecutor,* 7 M.L.J. 41.

(4) *Public Prosecutor v. Mat Nasir etc.,* 7 M.L.J. 153.

(5) *Rex v. Sodeman,* (1936) 2 All. E.R. 1138.

(6) *Rex v. Woolmington,* (1935) A.C. 462.

MAGISTRATE'S CRIMINAL APPEAL.

The facts proved or admitted, which are material to the question of onus of proof, and the arguments advanced at the trial appear from the following portions of the judgment delivered by the Magistrate.

Abdul Hamid bin Mustapha, Deputy Public Prosecutor for Public Prosecutor.

Dato Roland Braddell (*Goho* with him) for accused.

Weiss, First Magistrate.—The accused in this case is charged with having accepted a gift of $30/- without consideration from one Cheah Koon Hwee (hereinafter referred to as Mr. Cheah) a person whom the accused knew to be concerned in a matter connected with his official functions as a public servant.

Mr. Cheah is, and was at all material times, the proprietor of a Cinematograph Theatre at Segamat known as "Cheah's Hall". In August 1937 he had applied to the President of the Town Board for a licence to use the Hall for the exhibition of sound films. At first this licence was refused, but eventually it was promised on the condition that plans were to be submitted embodying certain structural alterations, listed under 23 headings, which were found to be necessary for compliance with the Town Board regulations and Bye-laws. In due course plans were submitted and passed and the work begun.

The accused is the Senior Health Inspector for the Segamat Town Board, and, as such, it was a part of his duties to inspect the work and report to the President on its compliance or otherwise with the plans and relevant bye-laws.

Until sometime in January or February 1939 relations between Mr. Cheah and the accused appear to have been quite friendly. On the 14th February the accused incurred Mr. Cheah's displeasure, and I have no doubt whatever that the events of the 19th February are directly traceable to those which occurred five days earlier.

There is much conflicting evidence as to what took place between these dates, but I have no hesitation in accepting as correct the history of events as related by the accused and his witnesses. Corroboration can be found not only in entries and minutes in official records but in the testimony of the President of the Town Board, a witness called by the Prosecution. Further, there is every reason to believe that the accused had performed his duties in connection with Cheah's Hall in a regular and conscientious manner, though

doubtless, too strictly in the opinion or liking of Mr. Cheah.

On the 18th February Mr. Cheah invited the accused to visit his house the following morning, the first day of the Chinese New Year. I accept the accused's statement that Mr. Cheah pressed him to do so.

On the same day Mr. Cheah informed Mr. Gaffikin, the Chief Police Officer, that the accused was coming to his house for the purpose of receiving a present of $30/- in connection with the work at Cheah's Hall.

On the 19th February the Chief Police Officer, accompanied by the O.C.P.D., Segamat, concealed themselves in Mr. Cheah's house in a manner that would enable them to overhear conversation between Mr. Cheah and the accused. The accused duly arrived and was immediately engaged by Mr. Cheah in conversation about the work at the Hall. In the course of this conversation Mr. Cheah handed to the accused three marked $10/- currency notes which the accused thankfully received and put in his pocket. What, if anything, was said by Mr. Cheah at the moment he handed over the notes was inaudible to Mr. Gaffikin. As the accused was about to leave the house he was stopped by Mr. Gaffikin and, at his request, produced from his pocket the three marked $10/- notes.

Such is the case for the prosecution.

Thirdly, it is submitted on behalf of the accused, that an offence under Section 165 of the Penal Code is not complete with the mere passing of money: that there must be shown in addition a corrupt or improper motive. Counsel urged that if the evidence of Mr. Cheah is disregarded there is no other evidence from which a corrupt motive can be deduced: and that it was oppressive to the accused to bring evidence, which, if accepted, would establish an offence under Section 161, while charging an offence under Section 165. I regret I am unable to see the force of the latter part of this argument. If Mr. Cheah's evidence is accepted, a charge under Section 161 might be sustainable. If his evidence is *not* accepted, there is still sufficient evidence to sustain a charge under Section 165. Why should the prosecution be expected to proceed on a more serious charge, the proof of which is uncertain, when they have what they deem reliable evidence to support a lesser charge? I see nothing unfair or oppressive in the prosecution of a charge under Section 165, but I am disposed to adopt the view that though under this section the question of express motive or reward is immaterial, the giving of the present must be traceable to a desire for official favour and that its acceptance must be with the knowledge, or at least the suspicion, that it is offered as a veiled gratification.

Can such knowledge be imputed to the accused? Are the circumstances such as to justify the inference of an intention on the part of the accused to accept and retain the present notwithstanding his official relations with the giver? I think both these questions must be answered in the affirmative. The facts proved by the Chief Police Officer surely raise a presumption, the onus of rebutting which must lie upon the accused. The state of a man's mind can only be deduced from his behaviour, and if in the present case the accused had offered no evidence as to the state of his mind, the inference to be drawn from his actions would be not only irresistible but conclusive. Illustration (a) to Section 107 of the Evidence Ordinance says that when a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him, the intention being a fact especially within the knowledge of such person.

Lastly, the accused relies on the rule in *Woolmington's case*—adopted in this State by the Court of Appeal in *Lim Tong vs. The Public Prosecutor*[3]. Notwithstanding illustration (a) to Section 107 of the Evidence Ordinance his Counsel argue that I must have regard to the principle, even in the circumstances of the present case, that the onus of proving criminal intention lies upon the prosecution and never shifts. They say that by exposing Mr. Cheah's true motives in causing the charge to be brought, and by showing him to be an untrustworthy witness, they have succeeded in raising a reasonable doubt as to the existence of any criminal intention.

Now criminal intention is a matter of inference to be drawn from all the circumstances of the case. The circumstances from which the inference can be drawn in the present case are not the circumstances described by Mr. Cheah, but the circumstances described by Mr. Gaffikin and his subordinate officer. These circumstances are clearly sufficient in themselves to justify an inference of criminal intention. The question, therefore, is whether the accused, by his

explanation, has raised a reasonable doubt as to whether such inference is right or wrong.

It is here that the difficulty arises. His explanation is lacking in any corroboration, although as I have stated above, corroboration should not have been out of reach. On the other hand I was much impressed by the manner in which the accused gave evidence. If the evidence he gave had been that of a disinterested witness I should doubtless have accepted it all as true. Is this sufficient to raise a reasonable doubt? What indeed is the degree of doubt which the accused is required to raise in order to discharge the onus that is cast upon him in this case by Section 107 of the Evidence Ordinance?

In *Rex vs. Sodeman*[5] it was laid down that the onus on an accused who raises by way of defence an exception, such as insanity, is no higher than the onus on a plaintiff, or defendant in a civil suit. Presumably the same rule must apply to the case of an accused who is seeking to rebut a presumption raised against him by the application of any other statutory provision.

In the case of *Chia Chan Bah vs. The King*[1] the rule in *Sodeman's case* was adopted by the Court of Appeal in the Colony. It was there explained that the onus is discharged if the accused can tip the scale of probability in his favour.

The same question arose for the consideration of the Court of Appeal of the Federated Malay States in the cases (heard together) of *The Public Prosecutor vs. Alang Mat Nasir bin Anjang Talib* and *Chen Lip*[4]. There the Court, following the rule in *Sodeman's case,* held (by a majority), on the facts, that there was sufficient evidence in support of the defence raised by the accused to tip the scale in his favour.

In the present case the accused by his own evidence, but by that alone, has raised in my mind an element of doubt. Is he, as his Counsel claim, entitled to the benefit of this doubt? He has certainly not succeeded in inducing a belief that the balance of probabilities, even in the slightest degree, is in favour of what he alleges. Nevertheless he has raised a doubt.

The same difficulty appears to have been felt by Cussen J. in the case to which I have last referred; but I am unable to find either from his judgment or from the judgment of the other members of the Court any material which might serve as a guide in a case where the probabilities are almost equiponderant, as it might be argued they are in the present case.

In the absence of judicial interpretation I can be guided only by what appears to me the plain language of the Evidence Ordinance. Section 107 casts upon the accused the burden of proving a certain fact, namely an intention other than that which the character and circumstances of a certain act clearly suggest to be the intention. That fact has been neither proved nor disproved, and Section 3 of the Ordinance provides that when a fact is neither proved nor disproved it is said to be "not proved".

I must hold, therefore, that the accused has failed to discharge the onus which lies upon him. It follows that he has failed to rebut the presumption of guilt which flows from the facts proved, and, in the result, he must stand convicted of the offence charged against him.

The accused appealed and upon hearing *Das* for the appellant, Mills J. directed, under Section 55 of the Courts Enactment, that the appeal be heard and determined by the Court of Appeal.

Before the Court of Appeal:

Goho for Appellant,

L. V. J. Laville, Public Prosecutor, in person.

Goho submitted, *inter alia,* that the onus that was cast on an accused person by Sections 106 and 107 of the Evidence Ordinance was merely an onus to introduce such evidence as would bring his case within the exception relied on, and that he had not the onus of establishing the truth of his statements. It was upon the prosecution to establish clearly the guilt of the accused that the onus lay. He cited:

Rex v. Woolmington[6].

Emp. v. Dampala[2].

After hearing argument, **McElwaine, C.J.** as President of the Court, delivered the following oral judgment:

We have derived a great deal of assistance from Mr. Goho in this appeal, and if I may say so, we have derived even more assistance from the Magistrate's grounds of judgment in which he has set forth very clearly the facts which he has found and the impression made upon him by the witnesses in the case.

The taking of the money on this occasion is common ground in the case. The one point raised was: should the Magistrate have accepted the accused's story that this was what I would call a token acceptance, and that in the previous year he had accepted and returned a smaller gift, and that upon this occasion he had also accepted this gift with the object of not offending Cheah or his mother, and that it was his intention of returning the gift.

Wherever there has been conflict in the evidence of witnesses, Cheah has been disbelieved and the accused believed.

The Magistrate has found that the accused was inveigled into going into Cheah's house on the morning when the money was handed over, and that Cheah had arranged with the police to come and see the $30/- handed over. No evidence whotsoever was brought to show that accused expected to receive the $30/-.

The accused, as the Magistrate has said again and again has raised a doubt as to whether his story was not correct, and I think that when the Magistrate is left in that state of mind, then he must say that the accused has tilted the scale of probability in his own favour; the probability that what he accepted was a token acceptance which he meant to return.

I think on the evidence, and particularly on the Magistrate's finding, that he believed the accused—that he would have accepted the accused's evidence had the accused been an independent person—shows that the accused had made an impression on him that he was a witness of truth. I think in the face of this evidence and the impressions of the Magistrate, we must say that he had such a reasonable doubt in his own mind that he ought not to have convicted the accused. For these reasons we allow the appeal.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]
LAVILLE, J.
December 31, 1939.

MOONA SEENA MUTHUKARAPPA CHETTIAR — Plaintiff Appellant

v.

1. LOW TIN POH
2. PANG KING KEE — Defendants Respondents

[CIVIL APPEAL No. 2 of 1939]

Civil Procedure Code, Section 129—Trial of Action in Magistrate's Court—Procedure where no Statement of Defence delivered.

In an action brought on a Promissory Note the two defendants appeared and contested the claim but did not signify the nature of their defence. The plaintiff failed to satisfy the Magistrate that the defendants, or either of them, were the makers of the note and the claim was accordingly dismissed.

Held, on appeal, that as the Court had failed to ascertain from the defendants which allegations of fact they denied, the trial of the action had been irregular and that the plaintiff was therefore entitled to a new trial. Section 129 of the F.M.S. Civil Procedure Code considered and explained.

MAGISTRATE'S CIVIL APPEAL.

The facts and arguments sufficiently appear from the Judgment.

Dato Roland Braddell (*C. G. Toh* with him) for plaintiff-appellant.

Goho for defendant-respondents.

Cur. Adv. Vult.

Laville, J.—This is an appeal against the judgment of the 2nd. Magistrate, Johore Bahru in J.B. Civil Suit No. 42 of 1939. In that suit plaintiff M.S. Muthukarappa Chettiar a moneylender sued Low Tin Poh and Pang King Kee for money due on a P/N amounting to $841.20. At the hearing both parties were represented by counsel. Plaintiff appeared by his attorney R.M. Meyappa Chettiar and defendants in person. The P/N was executed on 5th March, 1936 for the sum of $600/- bearing interest at 24%.

The plaintiff's plaint sets forth

(1) that he is P/A of Plaintiff and thereby authorised to file the plaint
(2) plaintiff's trade and address
(3) defendants' business and residence
(4) details of the P/N on which he sues and the fact that a copy marked "A" is annexed to the plaint
(5) interest already paid thereon
(6) amount still due
(7) claim for amount due, further interest, any other relief, costs.

The summons and copy of plaint was served on defendants' solicitors on 28.2.39. No statement of defendant's case was filed and the suit came up for disposal on 26.3.39. The Magistrate's record shows that counsel and parties were present and that plaintiff's counsel opened his case and tendered P/N Ex: "A" which was then put in and marked "A". He then called MEYAPPA CHETTIAR the P/A of plaintiff to give evidence.